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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the
United States Court of Customs and Patent Appeals

REPLY BRIEF FOR THE PETITIONER

STATEMENT

In its brief, the Government warns of dire consequences that it imagines would flow from reversal. It poses economic and policy issues clearly legislative in nature. It argues that its position is supported by legislative history, legislative ratification of administrative practice, and case law.

The Government's gloomy imaginings are fanciful; its legislative argument misplaced; its legal argument shallow. This reply brief so demonstrates as we respond to the points of the Government's "Argument".

ARGUMENT

The Government's Brief Fails To Refute The Petitioner's Argument That The Forgiveness Of The Japanese Commodity Tax On The Exportation Of The Subject Consumer Electronic Products Constitutes A Bounty Or Grant

A. The Alleged Neutrality of Noncollection of Indirect Taxes on Exportation

The Government urges that the remission of indirect taxes on exportation is trade neutral and serves to prevent what the Government calls "double taxation", *e.g.*, taxation by Japan on manufacturers' shipments and taxation by (most of) the States on retail sales. Not only is this argument starkly inconsistent with the United States' position stated repeatedly and forcefully over a considerable period of time (*see* petitioner's brief, 39-43), but clearly it is an argument that belongs before the Congress.

Under the countervailing duty law, as construed by this Court, the remission of an indirect tax on exportation is a bounty or grant. *Downs* v. *United States,* 187 U.S. 496 (1903). Moreover, without even considering *Downs,* the forgiveness of a cost on exportation is, indisputably, a bounty or grant. A tax is a cost and its forgiveness on exportation must be treated no differently than the forgiveness of any other cost.

Congress could have given special consideration to taxes in view of their being governmentally-imposed costs. For policy reasons, Congress could have attempted to provide for the application of countervailing duties in such a manner as to neutralize the effects of varying tax policies on international trade—but it

has not done so.[1] Unless and until Congress elects to give special treatment to the remission of indirect taxes under the countervailing duty law, such remission, like the remission of any other cost, must be countervailed.

B. Legislative History

The Government argues once again[2] that the legislative history of the 1897 countervailing duty law reveals that Congress did not consider the refund of internal taxes on exportation not in excess of taxes

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[1] Neutralization may well not be attainable; it is certainly not attained by the present GATT rules (or the Secretary of the Treasury's practice under the countervailing duty law). Government spokesmen have recognized that indirect taxes have reached relatively high levels, that such taxes are not shifted fully forward into the price of the product sold, and that their remission at the border is not trade neutral. These officials have also recognized that the border tax adjustment rules have an influence on the distribution of activities between the government and the private sector, as many of the governmental services financed by indirect taxes may be provided through the private sector in other countries. Moreover, they have questioned whetner one aspect of government policy should be singled out for special treatment (adjusting at the border for indirect taxes), since there are not adjustments for a wide range of other government measures (including various forms of taxation) which directly affect private industry, prices, and trade. *See, e.g.,* speech of former Assistant Secretary of the Treasury John R. Petty, App. 117-138, esp. 132-134; Statement by Representative of United States on Border Taxes Before GATT Working Party, April 30, 1968, reprinted in *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 1005-1010 (1971). *See also* Staff of Senate Comm. on Finance, *Summary and Analysis of H. R. 10710 —the Trade Reform Act of 1973,* 93d Cong., 2d Sess. 99-108, esp. 103-107, 107-108 (1974).

[2] This argument of the Government did not commend itself to a single one of the eight judges of the Courts below. *See* App. A to pet., pages 9a-13a, 18a-21a, 29a-42a; App. C to pet., pages 70a, 97a n. 10.

actually paid to be a countervailable bounty or grant. We submit that the Government's approach, analysis, and conclusions in this matter are erroneous.

Firstly, this action involves section 303 of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974 (enacted in 1975); it does not involve section 5 of the Tariff Act of 1897. 30 Stat. 151, 205. The history of the present statute is rich with judicial interpretations in point, *e.g., Downs* v. *United States,* 187 U.S. 496 (1903), and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). Simply stated, this Court has held and the Congress, by reenactment, has agreed that tax remissions on exportation are bounties or grants within the embrace of the countervailing duty law.

Indeed, even without considering this Court's teachings that tax remission on exportation is a bounty or grant, it is clear from the various Court decisions that the language in the countervailing duty law is not "obscure, abstruse, mystic, or even ambiguous," *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, 106, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919); that it is broad in scope and reaches "the conferring of something" upon exportation, *Nicholas, supra,* 249 U.S. at 39; that "[i]f the word 'bounty' has a limited sense the word 'grant' has not," and "[a] word of broader significance than 'grant' could not have been used," *ibid.*; that the change in language from the 1894 statute (the addition of the word "grant") "is significant of a purpose to extend the latitude of the provision," *Nicholas, supra,* 7 Ct. Cust. Appls. at 104; and that Congress could have expressed disapproval of the various judicial readings mentioned above, but chose not to do so. *See American Express Co.* v. *United States,* 332 F. Supp. 191, 199 (Cust. Ct. 1971), *aff'd on other grounds,* 472 F.2d 1050 (C.C.P.A. 1973). *See also Downs* v. *United States,* 113 F. 144, 147-148 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903).

Secondly, the various debates and fragments of history upon which the Government relies do not support its argument. Contrary to the Government's suggestion, there is no common thread running through the 1890, 1894, and 1897 countervailing duty legislation. Paragraph 237 of the Tariff Act of 1890, 26 Stat. 567, 584, and paragraph 182½ of the Tariff Act of 1894, 28 Stat. 509, 521, provided for the assessment of countervailing duties, in the amount of 0.1 cent per pound, on certain sugars. Conceptually, however, the two provisions were markedly different. The 1890 law was enacted to give protection to domestic sugar *refiners,* and the mechanism for countervailing duty assessment (against refined sugar only) was activated upon the ascertainment of a difference between the export bounty on refined sugar and the export bounty on raw sugar; under the 1894 law, where tax remissions were involved, attention focused on the difference between the bounty bestowed on all sugars and the internal taxes collected on the beet or cane from which the sugar was produced.

Notwithstanding the introduction of a new concept of "net bounty" in the 1894 debates on German sugar exports (*see* Government's brief, 22), *i.e.,* excess of bounty over tax collected on beet or cane,[3] the 1890

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[3] The concept could have had no real or practical application, since cane was not used in Germany and beet was no longer taxed in that country. *See* Laughlin & Willis, *Reciprocity,* 151, 154 (1903). A direct bounty system had replaced the system whereunder beets were taxed and excessive refunds were paid on the sugar exported. *See, e.g., id.* at 154; *Tariff Hearings Before the House Comm. on Ways and Means,* 54th Cong., 2d Sess. 618 (1896). It appears that

concept of "net bounty", *i.e.*, difference between export bounty on refined and on raw sugar, appears to have persisted in the minds of some.[4] *See, e.g.*, 30 Cong. Rec. 2707 (1897) (Remarks of Mr. Dingley); 26 Cong. Rec. App. 783 (1894) (Remarks of Mr. Quay, observing that "the bounty on German refined sugar, so far as the American refiner is concerned, is reduced to the difference between the thirteen one-hundredths cent export bonus on raw and twenty-one and one-half hundredths cent per pound on refined sugar, or only eight and one-half hundredths cent * * *."); *Tariff Hearings Before the House Comm. on Ways and Means*, 54th Cong., 2d Sess. 641-642 (1896).

The Government now depicts the countervailing duty provision of the 1897 Act as merely a restatement of the two earlier laws which were designed only to reach the actual, "net" bounty received by the German exporters. This contention is puzzling since, not only was the 1897 language radically different, but as we have taken pains to note in this reply brief, any concept of "net bounty" in the 1890 provision was markedly different from the concept in the 1894 provision. Under the former, the focal point was discrimination —as long as export benefits received on refined sugar did not exceed export benefits received on raw sugar, there were no countervailing duty consequences. Under the latter, the focal point was the excess of tax

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Senator Jones and Senator Quay (*see* remarks made at 26 Cong. Rec. App. 783 (1894)) did not correctly understand the German law.

[4] In fact, the amount of countervail to be assessed under the 1894 provision, 0.1 cent per pound, was slightly in excess of the difference between the German export bounty on refined sugar and the German export bounty on raw sugar.

refunded on exportation over tax collected on the beet or cane—*i.e.*, a practice that had once existed under a German law which Congress did not realize was repealed.

Further, when the 1897 bill was introduced in and passed by the House of Representatives in March 1897, it contained a provision which followed the 1894 concept. Section 206 provided that all sugars, "the product of any country which pays, directly or indirectly, a bounty on the export thereof, whether imported directly and in condition as exported therefrom, or otherwise, shall pay, . . . a duty equal to such bounty, or so much thereof as may be in excess of any tax collected by such country upon such exported article, or upon the beet or cane from which it was produced." The Government argues that Congress in 1897 was concerned primarily with the laws of Germany and was conversant with those laws, yet the House of Representatives made manifest the same lack of knowledge of the German law that the 1894 Congres had done, by attempting to deal with an indirect bounty system whereunder tax is first paid on beets and later refunded in "excessive" amounts on exported sugar. We submit that Congress cannot be presumed to have had the knowledge which the Government imputes to it. *See* 21 Op. Att'y Gen. 80, 83-84 (1894), wherein the Attorney General made a comment equally appropriate for the Congress as himself: "The laws of Germany I do not and can not be expected to know . . ."

In brief, the Government's assumption that the 1897 Congress was fully conversant with the workings of the German sugar tax laws and consciously refrained from taking action against the forgiveness of the Ger-

man consumption tax on exportation cannot be justified. As Judge Boe remarked [App. A to pet., page 39a]:

> "The colloquy engaged in by the members of Congress rather would appear to emphasize the dubious familiarity and understanding on their part with respect not only to the provisions of the German Sugar Act in question, but the specific legislation under their immediate consideration. To adopt an interpretation of our countervailing duty statute upon a presumed legislative intent predicated upon the apparent limited and conflicting understanding evidenced by statements then made by some of the members of Congress, indeed, would do violence to the rules of statutory construction."

If, however, Congress were to be imputed with actual knowledge of the German Tax Law, from information on the record, and if it intended to countervail only bounties in excess of internal taxes paid, then in calculating the amount of countervailing duty against the direct bounties conferred by Germany on exportation of refined sugar ($.38 per hundred pounds) and raw sugar ($.27 per hundred pounds), its members should have made an effort to subtract from said $.38 or $.27 per hundred pounds the amount of internal tax paid.[5] This was consistently not done.[6] The members of the Congress consistently viewed the amounts of

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[5] Under the 1896 German law, a tax was levied on the output of sugar factories of at least 10 pfennigs (2.38 cents) per 100 kilograms (the rate increasing with the volume produced). The tax was not remitted on exportation. *See Tariff Hearings Before the House Comm. on Ways and Means*, 54th Cong., 2d Sess. 617, 618 (1896).

[6] *See, e.g.*, 30 Cong. Rec. 1650, 1658, 1674, 1679, 1680, 1719, 2203-04, 2718, 2823-26 (1897). Senator Allison's remarks at 30 Cong. Rec. 1721 constitute an exception.

countervailing duty to be assessed to offset the aforedescribed direct bounties as being $.38 and $.27 per hundred pounds, respectively. *See* n.6.

In any event, an exhaustive study of the debates fails to shed greater light on the Congressional intention than the actual language of the enactment. Even after the Senate-House Conference, there was considerable confusion in the Senate, *see, e.g.*, colloquy between Senators Jones and Aldrich, 30 Cong. Rec. 2823-25 (1897), and in the House, 30 Cong. Rec. 2707 (1897) (Remarks of Mr. Dingley). Congressman Dingley (after whom the 1897 Tariff Act was named), in fact, made the astonishingly erroneous comment that section 5 of the 1897 law employed the discriminating bounty concept of the 1890 law. *Ibid.*

What the Government altogether ignores in its "legislative history" argument is the language used by Congress in section 5 of the 1897 Act. This language was entirely different from that used in previous legislation, and stated:

> "That *whenever* any country, dependency, or colony shall *pay or bestow,* directly or indirectly, *any bounty or grant* upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of *any* such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, *in all such cases,* in addition to the duties otherwise

> imposed by this Act, an additional duty equal to the net amount of such bounty or grant, *however the same be paid or bestowed.* The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties." [Italics supplied.]

Thus, whenever any export bounty or grant was paid or bestowed on dutiable merchandise, then upon the importation of any such merchandise into the United States, a countervailing duty was to be assessed, *in all such cases,* equal to the net amount of such bounty or grant. This was new legislation.[1] As the Government effectively argued in its brief before this Court in *Nicholas* (page 35):

> "Petitioners' brief in the Nicholas case seems to attempt (p. 40) to limit the effect of the term 'grant' and to contend that it means little more than 'bounty.' In paragraphs 237 of the tariff act of 1890 (26 Stat. 567, 584) and 182½ of the tariff act of 1894 (28 Stat. 509, 521) relating to countervailing duties on sugar, Congress used only the word 'bounty.' Section 5 of the tariff act of 1897 (30 Stat. 151, 205) broadened the counter-

[1] In *S. Doc. No. 329,* 55th Cong., 2d Sess. (1898), a comparison of Tariff Acts of 1897, 1894, and 1890 is presented. At pages 62-64, paragraph 237 (and other provisions in the sugar schedule) of the Tariff Act of 1890, paragraph 182½ (and other provisions in the sugar schedule) of the Tariff Act of 1894, and paragraph 209 (sugar provision) of the Tariff Act of 1897 are grouped together. Section 5 of the 1897 Act is not included in this group. However, at pages 178-179, where the text of section 5 does appear, as an 1897 provision, the following notations properly appear next to "1894" and "1890": "[NOTE.—No similar provision.]."

> vailing duty provision. Therein Congress used the additional verb 'bestow' and the additional noun 'grant,' thus manifesting a purpose to make the provision broad and all-inclusive. The purpose of Congress to cover everything in the nature of a bounty or grant is expresed in the language 'shall pay or bestow, directly or indirectly, any bounty or grant,' and again, 'however the same be paid or bestowed'."

Clearly, this Court agreed with the Government, *see Nicholas, supra.* 249 U.S. at 39, as did the Court of Customs Appeals, *see Nicholas, supra,* 7 Ct. Cust. Appls. at 104.

The Government's present argument that Congress' use of the ordinary word "net" in the expression "net amount of such bounty or grant" was Congress' way of telling the public that it wished merely to reenact the 1894 provision (although extending the coverage to products other than sugar) and not to countervail grants (tax remissions) which do not exceed taxes collected simply defies reason. *See* opinions of the judges of both Courts below, cited at n. 2, *supra.* Had Congress wished to continue the 1894 proviso in effect, it could have said so without any difficulty.

C. ADMINISTRATIVE PRACTICE

The Government boldly asserts that Congress has reenacted section 303 without material change five times since 1897 *with knowledge* of the Secretary's interpretation regarding tax remissions and that these reenactments demonstrate that Congress has ratified that in-

terpretation.[8] Actually, the only reenactment that can be said to have been made with knowledge of the Secretary's interpretation was the last one, *i.e.*, the Trade Act of 1974, and there the key Congressional committees took pains to assert that they were neither approving nor disapproving that interpretation.

Nevertheless, the Government insists that Congress ratified Treasury's practice. It seeks to avoid the aforesaid Committee statements by asserting that they were made in connection with amendments to another statute, *viz.*, the Antidumping Act of 1921 (19 U.S.C. § 160 *et seq.* (Supp. V 1975)). We submit that this argument cannot withstand scrutiny. The Trade Act amendments to both the Antidumping Act and the countervailing duty law appear in Title III of the Trade Act, "Relief from Unfair Trade Practices," as sections 321 and 331, respectively. 88 Stat. 1978, 2043, 2049. The sections are clearly interrelated, with each section referring to both the Antidumping Act and the countervailing duty law. For the Government to say that remarks made by the Committees with respect to section 321 of the Trade Act can have no bearing on the Congressional intent

[8] The Government is prepared to *assume* that the first four reenactments were made with such knowledge. Government's brief, 24. The Government is not prepared to assume that Congress had knowledge of "petitioner's interpretation of [this Court's teachings in] *Downs*" at all. *Id.* at 30. Not only is the choice of assumptions puzzling, but evidently the Government has overlooked numerous materials making manifest a Congressional awareness of *Downs*, as we "interpret" it. *See, e.g.*, 2 Senate Comm. on Finance, *Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies*, 90th Cong., 2d Sess. 568-569, 887-888, 918-919 (1968); *Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means*, 90th Cong., 2d Sess. 2216-2219, 2220-2221, 2227 (1968); *S. Rep. No. 91-1431*, 91st Cong., 2d Sess. 284-285 (1970).

behind section 331 of the Trade Act is simply unsupportable.

The Government proceeds to claim that any inference that is appropriate with respect to Congress' actions concerning the Antidumping Act must be favorable to the Government's position because Congress adopted an amendment to the Antidumping Act that the Treasury Department had requested for the express purpose of conforming the standards under that Act to the distinction between the remission of direct and indirect taxes employed under section 303. Once again the Government errs. It refuses to recognize that each key Committee has expressly indicated that it was not ratifying Treasury's practice, and that the Committees (and the Congress) did not accept the Department's proposal intact. Although Congress amended the definition of "purchase price" (in the Antidumping Act) by permitting the addition to the price of "the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected by reason of the exportation of the merchandise to the United States," as the Treasury Department had proposed, Congress also added a proviso which the Treasury Department did not propose and which conflicts with Treasury's practice under the countervailing duty law. The aforementioned taxes may be added to make "purchase price" "*but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.*" Section 321(b), Trade Act of 1974 (emphasis supplied). The Committee on Ways and Means explained

the purpose of this proviso, as follows (*H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973)):

> "With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated. Further, an adjustment for such tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased."

Thus, Congress expressed its recognition that indirect taxes imposed on the product may not shift forward into the price but may be absorbed by the seller, and further, to the degree that they are so absorbed, they should not reduce any margin of price discrimination (dumping). Under Treasury's countervailing duty *practice,* however, no inquiry is made into tax shifting: rather, every remission of indirect taxes imposed on a product is excused from countervail. Thus, even were the Government to look to the amendments to the Antidumping Act as guidance to the Congressional intention behind the countervailing duty law, it would fail to find support for its position.

Moreover, by the time of the enactment of the Trade Act, Congress clearly had become aware of the fact that this Court, in *Downs* and *Nicholas,* had placed an

interpretation on the countervailing duty statute which conflicted with the Secretary of the Treasury's.[9] All that was necessary to achieve the result commanded by those Court decisions—and to reverse the administrative practice—was to subject that practice to judicial review by opening the courts to American manufacturers who were adversely affected by a refusal to impose countervailing duties. This is precisely what Congress did. The Government's disavowal of the Trade Act's judicial review provision as irrelevant (Government's brief, 27 n. 18) simply avoids the issue.

Finally, the Government's plea that the Court should take into consideration the allegedly harmful effects on international trade that would result from a decision in petitioner's favor is an invitation by the Executive Branch to the Court to join in its persistent effort to defy the Congressional objective, as previously articulated by this Court. *See* Government's brief, 28-30. Congress knew that many countries had export assist programs which were countervailable under our law; it knew that the application of countervailing duties could lead to international friction; it recognized that the best solution to the problem of bounties and grants in international trade was the establishment through negotiations of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties. However, Congress also was mindful of the harmful effect on domestic industry of having to compete with bounty-fed import competition; it was determined to have the countervailing duty law enforced, in a timely manner, to afford domestic

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[9] *See, e.g.,* materials cited in n. 8, *supra.*

industry the requisite protection. Weighing the need for such protection against the harm that the application of countervailing duties could do to the negotiating process, Congress provided the Secretary of the Treasury with a *partial* and *temporary* escape valve—section 303(d)(2) of the Tariff Act of 1930, as amended (19 U.S.C. § 1303(d)(2) (Supp. V 1975)). *See H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 75-76 (1973); Staff of Senate Comm. on Finance, *Summary and Analysis of H. R. 10710—the Trade Reform Act of 1973,* 93d Cong., 2d Sess. 50-51 (1974); *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183-188 (1974).

The Government does not attempt to explain the reasoning and purpose of this carefully drawn statutory scheme; rather it ignores it, contenting itself to inject into this case aliunde the record below a species of *in terrorem* argumentation to frighten this Court into affirmance by asserting that the practical alternative to affirmance is a far-reaching despair.[10] The Govern-

[10] Actually, the Government's pessimistic forecast, with its conjectural statistics, its "short run" inflationary disturbances, and "long run" economic disasters, is grossly exaggerated and misleading. A reversal by this Court would *not* lead to the immediate assessment of countervailing duties on a wide range of imported products. Petitions would first have to be filed with and considered by the Secretary of the Treasury (or his delegate). The Secretary will have one year to act on such petitions. He will consider whether there are factors which distinguish such cases from this one. If he determines that the decision in this case compels him to conclude that a bounty or grant has been bestowed, he may then consider whether to invoke the postponement authority of section 303(d)(2) (assuming that the postponement authority is extended beyond January 3, 1979).

In the meantime, the United States and its trading partners will be involved in international negotiations, precisely in accordance with the Congressional contemplation. An agreement could be reached and found acceptable to Congress. In the absence of an acceptable agreement, Congress, of course, would still be free to amend the law should it be persuaded that it was in the nation's interest to do so.

ment's argument would dishonor our Constitutional system and convert this Court into a part of the policy-making apparatus of the Executive Branch, dissolving the checks and balances of the Legislative and Judicial Branches. *See* opinion of Judge Boe, App. A to pet., page 50a.

D. Case Law

The Government dismisses this Court's statement in *Downs* that remissions of tax on export are bounties as "unguarded language that was not informed by the focus of adversarial presentation." Government's brief, 33. However, not only did the parties in *Downs* clearly focus on the tax remission issue (*see* petitioners' brief, 12-14"), but the Court's forceful statement can hardly be viewed as "unguarded" when (1) it is consistent with deliberate statements made elsewhere in its opinion (187 U.S. at 502), (2) it is consistent with deliberate statements made in opinions delivered both before and after *Downs* (*United States* v. *Passavant,* 169 U.S. 16, 22, 23 (1898); *Nicholas & Co.* v. *United States,* 249 U.S. 34, 41 (1919)), and (3) it is prefaced by the Court's remarks that the two most important facts of the elaborate Russian program were that sugar

[11] Also, as the Customs Court observed in *American Express Company* v. *United States,* 332 F. Supp. 191, 198 n. 3 (Cust. Ct. 1971), *aff'd,* 472 F.2d 1050 (C.C.P.A. 1973), a substantial portion of the dissenting opinion of General Appraiser Tichenor in the *Downs* case is devoted "to arguing against tax remission as a bounty or grant, thus making clear that remission of taxes was a factor in the case from the outset."

on the home market was subject to tax and sugar exported paid no tax at all. 187 U.S. at 515. Moreover, the long list of authorities which have interpreted *Downs* as holding the remission of tax on export to be a bounty [12] is entitled to great weight. *See Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 733 (1975).

The Government's discussion of *Nicholas* is also marred by its attempt to restructure the Court's reasoning so as to coincide with the Secretary of the Treasury's approach of countervailing only "excessive" remissions.[13] This Court determined that the "allowance" in *Nicholas* was a bounty or grant—not because it was given in excess of a remitted excise tax, but because it constituted the conferral of a benefit on exportation. 249 U.S. at 39-40. In fact, as noted, the Court supported its conclusion by remarking that the remission of an excise tax on exportation is an example of a bounty or grant. *Id.* at 41.

Finally, the Government's efforts to dispose of *Passavant* (Government's brief, 34 n. 27), also fail. While *Passavant* did not involve countervailing duty, that

[12] *See* petitioner's brief, 11-12 n. 6. *See also* Note, 9 Law & Pol. Int'l Bus. 1229 (1977) and Note, 46 Fordham L. Rev. 573 (1977), both of which are critical of the Court of Customs and Patent Appeals' decision in this case in general and of that Court's reading of *Downs* in particular.

[13] Similarly, the Government is incorrect in stating that the lower courts in *Nicholas* did not understand that *Downs* stood for the proposition that all remissions of indirect tax are bounties (Government's brief, 34 n. 26). *See, e.g., Nicholas & Co.* v. *United States,* 29 Treas. Dec. 59, 62-65, T.D. 35595 (Bd. Gen. App. 1915), *aff'd,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919); *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, 105, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919).

opinion was cited in the only two countervailing duty decisions of this Court and exhibits this Court's recognition that the remission of a tax on export is an export assist, given "[d]oubtless[ly] to encourage exportation and the introduction of . . . [domestically manufactured] goods into other markets." 169 U.S. at 22.[14]

E. Factual Hearing

We agree with the Government that there is no need for a factual hearing. We agree that the issue here is one of law.

However, the Court below, in ruling for the Government, did not find that the remission of the Japanese commodity tax on exportation is not a bounty or grant as a matter of law but rather relied on a presumption that a determination had been made regarding economic result. We submit that that Court erred. Firstly, as a matter of law, the remission of the tax is a bounty or grant. Secondly, as a matter of procedure, summary judgment should not have been premised on a presump-

[14] The Government's statement that *Passavant* was reversed by Congress is inaccurate and misleading. That remitted taxes are not now included in the computation of value for ordinary customs duty purposes for most imports is, of course, irrelevant. But, in any event, remitted taxes are still included in dutiable value for many imported products, when appraisement is based on "foreign value" or "cost of production", as those terms appear in 19 U.S.C. § 1402 (1970). *See, e.g., Downing & Co.* v. *United States,* 16 Ct. Cust. Appls. 293, 300, T.D. 42873 (1928); *Schweppes (U.S.A.), Ltd.* v. *United States,* 43 Cust. Ct. 608, A.R.D. 111 (1950). For a list of those products appraised under 19 U.S.C. § 1402, *see* 93 Treas. Dec. 14-51, T.D. 54521 (1958).

tion.[15] Thirdly, as a matter of fact, that which was presumed did not occur. The decision not to countervail was clearly *not* made on the basis of an economic determination that no benefit is conferred on exportation, but rather was made in spite of the recognition that such a benefit is conferred. *See* petitioner's brief, 39-43.[16]

Thus, under the circumstances, no further hearing is necessary.

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[15] If the Court below believed that the "economic result" of the tax remission is decisive of the issue, it should have remanded, as Judge Miller stated in dissent, "to the Customs Court for development of a record on that point, a task that Court is specially equipped to undertake." App. C to pet., pages 88a-89a n. 6. [The Customs Court hears cases *de novo;* a remand to the Secretary of the Treasury would have been improper.]

[16] It is difficult to understand how the Government can characterize our factual observations [that the GATT rules regarding direct and indirect taxes "were premised on false assumptions • • • [and] provide for unfair rather than neutral treatment to nations • • •"] as new argument, not made before the Customs Court (Government's brief, 39 n. 32), since they are *identical* to those which we made to the Customs Court. *See* Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment, 25, 25-29. It is also difficult to understand how the Government can flatly dismiss those observations as erroneous, when they are based entirely on a continuous line of statements and analyses made by Executive Branch officials. *See* authorities cited in petitioner's brief, 39-43; *see also* opinion of Judge Newman of the Customs Court, App. A to pet., pages 29a-35a, 36a-37a.

CONCLUSION

The judgment of the Court of Customs and Patent Appeals should be reversed and the case should be remanded to enable that Court to decide the proper effective date for duty assessment purposes.

Respectfully submitted,

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